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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 98-204
Broadcast and Cable	)	
Rules and Policies	)	
and	)	
Termination of the	)	MM Docket No. 96-16
EEO Streamlining Process	)	

**OPPOSITION TO JOINT PETITION  
FOR STAY OF NEW BROADCAST EEO RULES**

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Cultural Environment Movement

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## SUMMARY

For over 18 months there have been no EEO Rules in effect. Broadcasters have been relieved of their obligation to widely recruit and conduct outreach efforts to ensure that job seekers know of employment opportunities at their stations. Just as the recently adopted FCC EEO rules are about to go into effect, the 50 Named State Broadcasters Association come now before the FCC asking for further delay. Because a stay will be detrimental to job seekers, over 40 organizations which represent the interests of minority groups and women across the country oppose the Joint Petition by 50 Named State Broadcasters Associations for Stay of New Broadcast EEO Rules (The "Joint Petition"). The Joint Petition should be denied because it does not meet the requirements set forth for such a petition to succeed in *Virginia Petroleum Jobbers Ass'n v. FPC*. 259 F.2d 921, 925 (D.C. Cir. 1958) [hereinafter *Virginia Petroleum*].

The Joint Petition does not satisfy the first prong of the *Virginia Petroleum* test because it fails to show that the State Broadcasters will suffer irreparable damage unless a stay is granted. The New Rules are constitutional. They do not require broadcasters to expend substantial efforts or incur substantial costs. They will not expose broadcasters to litigation or cause any reputational harm. The New Rules are a significant step back from the Former Rules and they have no effects that are as hyperbolic as the State Broadcasters claim. —

The Joint Petition does not satisfy the second prong of the *Virginia Petroleum* test because it fails to show that State Broadcasters are likely to prevail on the merits. The New Rules do not violate the Equal Protection Clause nor do they trigger strict or heightened scrutiny because they do not require gender or race-based decision-making. Deterring discrimination is a

legally supportable rationale for the FCC's New Rules. The New Rules are not, as the State Broadcasters claim "arbitrary and capricious." Furthermore, many of the claims made by the State Broadcasters are baseless and require an assumption of bad faith on behalf of the FCC.

The Joint Petition does not satisfy the third prong of the *Virginia Petroleum* test because it fails to show that no irreparable injury will be caused to others if a stay is not granted. The Petitioners make little effort to meet their burden of showing that the New Rules will not adversely affect others. In reality, without the New Rules in effect many women and minority job-seekers will lose out on employment opportunities.

The Joint Petition does not satisfy the fourth prong of the *Virginia Petroleum* test because it fails to show that the grant of a stay would be in the public interest. In reality, it is in the public interest to not grant a stay. It is in the public interest for broadcasters, who are public trustees, to have a workforce that reflects their community. The Broadcaster's argument that a stay would be in the public interest relies on their claim that the New Rules are unconstitutional. However, that claim is not valid because the FCC would not have adopted these rules if they were unconstitutional.

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**OPPOSITION TO JOINT PETITION  
FOR STAY OF NEW BROADCAST EEO RULES**

**I. INTRODUCTION**

The United Church of Christ, NOW Foundation, NOW Legal Defense and Education Fund, Center for Media Education, Feminist Majority Foundation, Philadelphia Lesbian and Gay Task Force, Women's Institute for Freedom of the Press, Minority Media and Telecommunications Council, African American Media Incubator, Alliance for Community Media, Alliance for Public technology, Black College Communications Association, Civil Rights Forum on Communications Policy, Cultural Environment Movement, Fairness and Accuracy in Reporting, League of United Latin American Citizens, Mexican American Legal Defense and Education Fund, Inc. Minority Business Enterprise Legal Defense and Education Fund, National

Asian American Telecommunications Association, National Asian Pacific American Legal Consortium, National Association of Black owned Broadcasters, National Association of Black Telecommunications Professionals, National Association for the Advancement of Colored People, National Bar Association, National Council of La Raza, National Hispanic Media Coalition, National Latino Telecommunications Taskforce, National Urban League, People for the American Way, Project on Media Ownership, Puerto Rican Legal Defense and Education Fund, Rainbow/ PUSH Coalition, Telecommunications Advocacy Project, Telecommunications Research and Action Center, Women's Institute for Freedom of the Press, ("UCC, NOW Foundation, *et al.*) by their counsel, hereby oppose the Joint Petition by 50 Named State Broadcasters Associations ("State Broadcasters") for Stay of New Broadcast EEO Rules (the "Joint Petition") filed on March 16, 2000. UCC and NOW Foundation, *et al.* ardently oppose the *Joint Petition*. It is truly disturbing fact that there has been no EEO Rules for 18 months. Although UCC and NOW Foundation, *et al.* do not believe that the new EEO rules go far enough to ensure employment opportunities for women and minorities, the rules are a start. And now after months with not having to abide by any EEO requirements, the State Broadcasters ask the Commission to grant them the extraordinary remedy of a stay in an attempt to stop the new rules from going to effect for an indefinite longer period of time. The State Broadcasters' delay tactic is unwarranted because the new rules afford them substantially more discretion than the old rules and grant them for the first time various options for compliance. In any event, the Commission should deny the Joint Petition because it fails to meet the high burden required before the Commission may grant the extraordinary remedy of a stay.



## II. ARGUMENT

The Joint Petition fails to meet any of the four factors that the Commission must consider when deciding whether or not to grant a stay: (1) whether the petitioner will suffer irreparable harm if the stay is not granted; (2) whether the petitioner is likely to prevail on the merits; (3) whether other interested parties would be substantially harmed if the stay is granted; and (4) whether the Public Interest favors granting the stay.<sup>1</sup> Indeed, as shown below the Joint Petition's utter failure to show irreparable harm by itself justifies denial of a stay.<sup>2</sup>

### A. The New Rules Will Not Cause Irreparable Injury to Broadcast Stations or to the Persons They Consider for Employment

The Commission has held that "[a] concrete showing of irreparable harm is an essential factor in any request for stay. The courts have required a stringent standard of proof on this issue, stressing that 'the injury must be both certain and great: it must be actual and not theoretical... Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.'"<sup>3</sup> The Petition utterly fails to meet this test. It

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<sup>1</sup>*Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>2</sup>See *Washington Metropolitan Area Transit Commission v. Heliday tours, Inc.*, 559 F. 2d 841- 43 (D.C. Cir. 1977) [hereinafter *Washington Metropolitan*]. Petitioners cite *Cityfed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) [hereinafter *Cityfed*] for the proposition that a stay may be issued if the arguments for one factor are strong even if the other arguments are not as strong. *Joint Petition* at 7. However, in that case, the D.C. Circuit held that the moving party must "demonstrate at least 'some injury'." *Id.* Thus it denied the stay because the movant failed to show irreparable harm.

<sup>3</sup>*General Telephone Company of California (MO&O)*, 8 FCC Rcd 8753, 8754 ¶ (1993) (fn. omitted), citing *Wisconsin Gas Co. v. FERC*, 758 F/2d 669, 674 (D.C. Cir. 1985) (per curiam; emphasis in original) [hereinafter *Wisconsin Gas*].

provides no evidence of the extent of any harm broadcasters might endure, much less evidence that such harm is irreparable. While the petition offers several theories for irreparable harm, none have merit. First, Petitioners allege that the New Rules will “force” broadcast stations to discriminate against white males, in violation of the equal protection component of the Fifth Amendment.<sup>4</sup> But as shown *infra*, the New Rules will do no such things.

Second, the *Joint Petition* alleges that the New Rules will require them to “expend substantial efforts and incur substantial costs in implementing the new regulations[.]”<sup>5</sup> However, the petition does not attempt to quantify these “costs.” Failure to quantify costs in a request for a stay is always fatal to the request.<sup>6</sup> Nor does the *Joint Petition* make a serious effort to show that these “costs” are so confiscatory that they would rise to the level of being “irreparable” and justify a stay. In any event the cost question is pending on reconsideration, and Petitioners do not show that their costs until the conclusion of reconsideration would be so high that their damage could be considered “irreparable” under well established law.<sup>7</sup>

Third, Petitioners allege that they will “run the risk of discrimination suits by those who perceive that they were not selected by broadcaster regulatees because they were not” women or

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<sup>4</sup>*Joint Petition* at 8, 9. Petitioners also state that the New Rules will adversely affect white male job applicants “who may be discriminated against.” However, Petitioners do not claim to speak for these individuals, none of whom found this alleged career risk substantial enough to participate in this rulemaking proceeding. In any event, the New Rules do not affect white males’ legitimate job prospects. *See infra*.

<sup>5</sup>*Joint Petition* at 9.

<sup>6</sup>*See, e.g., Petitions for Waiver and Partial Reconsideration or Stay of Inmate-Only Payphones Declaratory Ruling*, 11 FCC Rcd 8013, 8016 ¶ 9 (Common Carrier Bureau 1996)

<sup>7</sup>*See e.g., Wisconsin Gas*, 758 F.2d at 674.

minorities.<sup>8</sup> Petition at 9. Nothing is more speculative than the argument that third parties might erroneously “perceive” that they are injured. Obviously, an agency cannot grant extraordinary relief based on the possibility that some third party will read the law wrong.

The Commission’s experience between 1971 and 1998 under its former, more aggressive rules, is instructive on the extent of this litigation risk. Interpreting the facts in a manner most favorable to petitioners, one factor the Commission used under the Former Rules in determining the level of scrutiny to apply in reviewing broadcasters’ renewal applications was the proportion of minorities and women hired.<sup>9</sup> Yet the record in this rulemaking proceeding did not disclose a single instance in which a white person or a male contended that this (or any other) aspect of the Former Rules harmed him, and petitioners know of no such instance. Under the New Rules it is even less likely that one such complaint would ever be filed, much less be successful.

#### **B. The State Broadcasters are Not Likely to Prevail on the Merits**

The State Broadcasters have failed to show either that they are likely to prevail on the merits of their claims. The State Associations make three arguments to justify their belief that they will prevail: (1) that the new EEO regulations violate the Equal Protection Clause, (2) that

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<sup>8</sup>*Joint Petition* at 9.

<sup>9</sup>There are only two instances of record in which a broadcaster erroneously construed the former rules as a command to hire minorities irrespective of merit. *Albany/Georgia Renewals*, 95 FCC2d 1, 9 (1983) and *Bennet Gilbert Gaines*, 10 FCC Rcd 6589, 6593 (ALJ 1995). In each case, the Commission took pains to emphasize that race-conscious hiring was not only required, it was lawful. Nonetheless, a court panel was able to find that a rational broadcaster *might* decide to hire minorities in order to forestall heightened Commission scrutiny. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353-54 (D.C. Cir.), *rehearing denied*, 154 F.3d 487 (D.C. Cir. 1998) [hereinafter *Lutheran Church*].

detracting discrimination does not justify outreach requirements, and (3) that the EEO Report and Order is arbitrary and capricious. There is no merit to any of these arguments.

1. The New EEO Regulations Do Not Violate the Equal Protection Clause of the Fifth Amendment

Put simply, the new EEO rules do not pressure stations to make gender or race-based decisions, therefore the rules do not implicate strict scrutiny under the Equal Protection Clause. Indeed, courts have consistently held that recruitment measures that are designed to expand the applicant pool do not favor anyone are not subject to strict scrutiny.<sup>10</sup>

In *Lutheran Church*, the court observed that if new EEO regulations "merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated."<sup>11</sup> That is what the Commission did. The New Rules omit the two aspects of the Former Rules that the Court found objectionable, i.e., that broadcasters compare their employment profile with the local labor force, and that the Commission's staff

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<sup>10</sup>See *R&O* n. 353 (citing *Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998) (curtailment of statutory preference to reside in redeveloped housing granted to former residents of area, most of whom were white, in order to make some of apartments available to all applicants regardless of race was not subject to strict scrutiny); *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997) (affirmative efforts to recruit women did not constitute reverse discrimination or support a finding that employer's reasons for hiring a woman were pretexts); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994) (both voluntary and consent decree provisions requiring recruitment of Black and women employees viewed by court as race neutral measures); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (affirmative action plan for county fire fighters designed to remedy past discrimination held narrowly tailored, in part, because fire department had tried "race-neutral" measures such as recruitment outreach to minorities and women in an attempt to diversify its applicant pool, with only limited success); *Shuford v. Alabama State Board of Education*, 897 F. Supp. 1535, 1553 (M.D. AL 1995) (outreach requirements are not subject to strict scrutiny because they only expand the pool of qualified applicants)).

<sup>11</sup>*Lutheran Church*, 141 F.3d at 351.

considered a station's employment profile in deciding the level of scrutiny to apply at license renewal time. The new rules simply require broadcasters to recruit broadly from all segments of society and to keep records sufficient to determine if their outreach efforts are effective. Moreover, the new rules themselves make clear that it is "not intended to require that any person be given preferential treatment based on race, color national origin, religion or gender."<sup>12</sup>

The State Associations not only disregard this express antidiscrimination language,<sup>13</sup> but take certain words out of context and claim that they show that the Commission's real regulatory purpose is to pressure broadcasters to grant gender and race preferences in hiring decisions. For example, the State Broadcasters claim that the "terms 'homogeneous' and 'poorly represented' are, at bottom, numerical 'underrepresentation measurements,' each connoting the lack of a sufficient number of minorities and women employed at a station."<sup>14</sup> What the Commission actually said was that

repeated hiring without broad outreach may unfairly exclude minority and women job candidates when minorities and women are *poorly represented* in an employers' staff--particularly when they are *poorly represented* in the ranks of management employees who make hiring decisions. It is not enough to say that one will not discriminate against anyone who applied for a job when not all have been given a fair opportunity to apply. Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a *homogenous* workforce does not simply replicate itself through an insular recruitment and hiring process."<sup>15</sup>

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<sup>12</sup>R&O ¶ 130, at 54 (citing 47 CFR § 73.2080(c)(1)(forthcoming).

<sup>13</sup>*Joint Petition* at 19.

<sup>14</sup>*Joint Petition* at 14.

<sup>15</sup>R&O ¶ 3, at 3 (emphasis added).

When the words are read in context, it is clear that the Commission intent is to ensure that minorities and women have an opportunity to find out and compete for jobs, not to pressure licensees to hire certain number of minorities or women.

2. Deterring Discrimination is a Legally Supportable Rationale for the New EEO Recruitment Outreach Requirements

The State Broadcasters allege that the Commission has never and cannot allege that the broadcast industry has been guilty of unlawful discrimination.<sup>16</sup> They then question whether recruiting more minorities and women is a deterrent to unlawful discrimination.<sup>17</sup> First, there is sufficient evidence in the record pointing to the fact that broadcasters indeed have been guilty of unlawful discrimination.<sup>18</sup> Second, the State Broadcasters fail to understand that closing out opportunities to certain members of the qualified applicant pool is alone an act of discrimination.

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<sup>16</sup>*Joint Petition* at 26.

<sup>17</sup>*Id.* at 27.

<sup>18</sup>*See Comments of Minority Media and Telecommunications Council, et al., ("MMTC")* at Vol. III (declarations from 22 witnesses that work in the broadcast industry that allege overt and subtle discrimination by broadcasters) and Vol. IV (discussion of the 22 witness statements); *See, e.g., Letter from MMTC to Chairman William Kennard*, December 10, 1997 (referencing a study by the International Women's Media Foundation which found that 61% of women journalists believe they still face barriers to advancement, that their white and male counterparts do not, with 51% saying they suspect that discrimination in promotion has hampered their professional advancement.). *See also Comments of National Hispanic Foundation for the Arts* at 16 (noting that "reliance on word-of-mouth job referrals is insufficient to prevent discrimination in hiring of minorities" and that "the broadcast and cable industries are cliquish industries, where knowing the right people is important to succeed and to receive job offers.").

Therefore, it is not unreasonable for the Commission to find that requiring broadcasters to reach "beyond the confines of their circle of business and social contacts" will deter discrimination.<sup>19</sup>

### 3. The New EEO Rules are not Arbitrary and Capricious

None of the arguments that the State Broadcasters make for claiming the rules are arbitrary and capricious have merit. They state the New Rules are "far more burdensome than any it has previously promulgated" and complain that "there is no explanation as to why all of these additional reports."<sup>20</sup> In fact, the only additional report is an election statement that broadcasters only have to file once and statement of compliance every two years.<sup>21</sup> The State Broadcasters do not explain how these reports are "complicated and expensive."<sup>22</sup> The State Broadcasters overlook the fact that under the Former Rules, they had to comply with complex and lengthy parity requirements.<sup>23</sup> Two additional reporting requirements cannot hardly be considered a burden. The new rules have significantly eased the ability for broadcasters to

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<sup>19</sup>R&O at ¶3.

<sup>20</sup>R&O at 28.

<sup>21</sup>The State Broadcasters attached an "Exhibit 1" to their *Joint Petition* in an attempt to visually persuade the reader into believing the New Rules were much lengthier and more burdensome than the Former Rules. In fact, the new regulations are neither. "Exhibit 1" includes specific examples for complying with the New Rules but does not for the Former Rules.

<sup>22</sup>*Joint Petition* at 29.

<sup>23</sup>The State Broadcasters complaint that the Commission now requires broadcasters in markets where the minority labor force was less than five percent to file EEO recruitment information is moot and without merit. They fail to acknowledge that since the Commission eliminated the processing guidelines, exemptions related to labor force are now moot.

comply because they offer options and provide specific examples, where the Former Rules did not.

The State Broadcasters claim that it was arbitrary and capricious for the Commission to not adopt their proposed "tear-off" sheet system and to require broadcasters with web sites to place their public file information on their web sites. The State Broadcasters discussion of the "tear-off" sheet system is laced with paranoia and angst towards public "third parties" being able to access their information. It is important that local community residents have a role in monitoring broadcasters' compliance with the EEO rules. A tear-off sheet will deprive the public of knowing which annual employment form refers to its community broadcaster. Similarly, requiring broadcasters to place their public files on their web sites afford more members of the public an easy and convenient way of monitoring the activity of the broadcaster that serves its community.

**C. Others will be Irreparably Harmed If the Commission Grants the Stay**

In the 1997 Access Charge litigation, the Commission held that "in the analysis of stay requests, the interests of other parties and the public interest are at least as important as the claims of irreparable harm to the moving party in the absence of a stay."<sup>24</sup> The Commission denied a stay in that litigation because, inter alia, the movants "devote[d] but a single paragraph

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<sup>24</sup>*Access Charge Reform (Order)*, 12 FCC Rcd 10175, 10191 ¶ 34 (1997) (citing *Virginia Petroleum*).



to the issues of harm to other parties and the public interest" without arguing "that a stay will not affect other parties and the public."<sup>25</sup>

Petitioners, like the movants in the 1997 Access Charges litigation, also make little effort to meet their burden of showing that the New Rules will not adversely affect others. Although the State Broadcasters claim that no one will be irreparably harmed by a stay of the new EEO rules,<sup>26</sup> minority and female job seekers will be harmed because they are less likely to find out about job opportunities if broadcasters do not engage the type of outreach required by the rules. Indeed, the record shows that job seekers have already been seriously harmed by the suspension of the former EEO rules. Any delay in restoring the EEO protection threatens to jeopardize gains in minority and female employment that the industry took 28 years to achieve.

The EEO rules have already been suspended since September 1998. A stay pending an appeal would have the effect of suspending the rules for an even longer and potentially a substantial amount of time. As the State Broadcasters are aware, the National Association of Broadcasters has sought reconsideration of the new rules.<sup>27</sup> Thus, it is likely that the Court will hold the appeal in abeyance until the Commission acts on the Petition for Reconsideration. Moreover, there is no guarantee that once the court does take up the appeal that it would afford it

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<sup>25</sup>*Id.*

<sup>26</sup>*Joint Petition* at 31.

<sup>27</sup>*Joint Petition* at 4, 32.

expedited treatment.<sup>28</sup> Thus, grant of the stay would lead to substantial delay and would cause irreparable harm to minority and female job applicants.

**D. A Stay would be Contrary to the Public Interest**

Not only would the grant of a stay irreparable harm minority and female job applicants, but it would also cause harm to the viewing public. It is in the public interest for broadcasters, who are public trustees, to have a workforce that reflects their community. Moreover, Commission found that the record support the position that diversity in the workforce fosters "greater diversity of viewpoints and programming that is responsive to the interest of a diverse community."<sup>29</sup> Thus, the public at large would be harmed by a grant of the stay.

The State Broadcasters fail to show how a stay would further the public interest. Their only argument is that the public interest is disserved anytime government action violates the Constitution.<sup>30</sup> However, as discussed above, the Commission has not violated the Constitution in adopting these rules. Moreover, in adopting these new rules, the Commission carefully reviewed its statutory mandate and extensive public comments in determining that the new rules would serve the public interest.

**III. CONCLUSION**

The *Joint Petition* fails to make the requisite showings for the grant of a stay. Specifically, the *Joint Petition* (A) fails to show irreparable damage if the stay is not granted, (B)

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<sup>28</sup>See *Joint Petition* at 31.

<sup>29</sup>*R&O* at 4.

<sup>30</sup>*Joint Petition* at 32.

fails to prove that the State Broadcasters are likely to succeed on the merits, (C) fails to show other parties would not be substantially harmed if the stay is granted, and (D) fails to prove that the public interest favors the stay. Indeed, the court has held that a petitioner's failure to demonstrate any irreparable harm by itself justifies the denial of a stay.<sup>31</sup> Furthermore, even if the Joint Petition was able to show substantial questions going to the merits this is only enough if "the other three factors strongly favor interim relief," which in this case they do not.<sup>32</sup> For these and all of the above stated reasons the Commission should not grant the requested stay.

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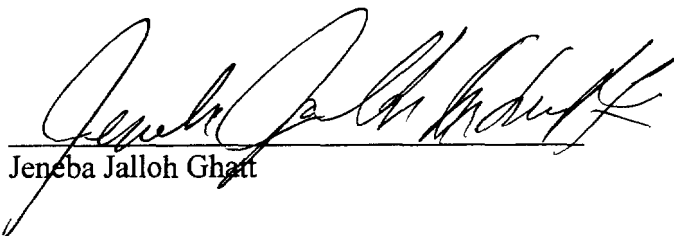
<sup>31</sup> *Cityfed*, 58 F.3d at 747.

<sup>32</sup> *Washington Metropolitan*, 559 F.2d at 843.

**CERTIFICATE OF SERVICE**

I, Jeneba Jalloh Ghatt hereby certify that I have this 23rd day of March, 2000 caused to be served by first class mail, postage prepaid, copies of the foregoing Opposition to the Joint Petition to:

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